Washington University in St. Louis

SCHOOL OF LAW

Interdisciplinary Environmental Clinic

May 29, 2015

Ms. Patricia Maliro
Chief, Air Quality Monitoring Unit
Air Pollution Control Program
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102-0176
Via email to patricia.maliro@dnr.mo.gov

Re: Comments on Ameren Missouri's Analysis of SO_2 and Meteorological Monitoring Stations Around Its Rush Island Energy Center

Dear Ms. Maliro:

On behalf of the Sierra Club, we submit the following comments on the report by Ameren Missouri titled Analysis of SO_2 and Meteorological Monitoring Stations Around Ameren Missouri's Rush Island Energy Center (Ameren's Monitoring Stations Analysis), which it submitted to DNR on or about April 29, 2015. The report describes the methodology Ameren used to determine the locations of three proposed ambient SO_2 monitoring stations and one meteorological monitoring station around its Rush Island Energy Center in Jefferson County, Missouri. Pursuant to a March 23, 2015 Consent Agreement with DNR, Ameren is required to install and begin operation of an SO_2 monitoring network around the Rush Island plant on or before December 31, 2015.

We believe Ameren's proposed monitoring sites should be rejected because they are located outside areas where peak 1-hour SO_2 concentrations are expected to occur based on the modeling described in Ameren's report. Furthermore, the modeling described in the report does not comport with EPA guidance on characterizing ambient air quality in areas around or impacted by significant SO_2 emission sources such as the Rush Island Energy Center and therefore may have failed to correctly identify areas of expected ambient, ground-level SO_2 concentration maxima. We also have concerns regarding the appropriateness of the meteorological data used in the modeling.

I. Based on the Modeling Described in Ameren's Report, the Proposed Monitoring Sites are Located Outside Areas Where Peak 1-Hour SO_2 Concentrations are Expected to Occur

The Consent Agreement (Appendix 1, ¶b) requires that "the number and location of SO_2 monitors and meteorological station(s) shall ensure that the approved SO_2 monitoring network represents ambient air quality in areas of maximum SO_2 impact from the Rush Island Energy Center." Ameren's Monitoring Stations Analysis (p. 3) describes the modeling it performed to

"delineate areas where maximum concentrations are expected to occur for this type of source and thus where SO_2 monitoring systems should be placed."

Unfortunately, the monitoring sites proposed by Ameren are not, in fact, located in "areas of maximum SO_2 impact from the Rush Island Energy Center," as required by the Consent Agreement.

Figures 1 through 4 below show the results of Ameren's modeling, which we derived using model input files provided by DNR. Figure 1 shows modeled SO_2 design values in the vicinity of the plant; Figure 2 shows receptors with modeled design values greater than or equal to 75 percent of the maximum modeled design value (146.1 ug/m^3); Figure 3 shows the number of times the model-derived maximum daily 1-hour concentration exceeded 75 percent of the maximum modeled design value at each receptor; and Figure 4 shows the receptors with the top 200, 100, 25, and 10 modeled design values. The locations of the plant and the proposed Fults, Natchez, and Weaver-AA SO_2 monitoring stations and the proposed Tall Tower meteorological monitoring station are shown on all figures for reference.

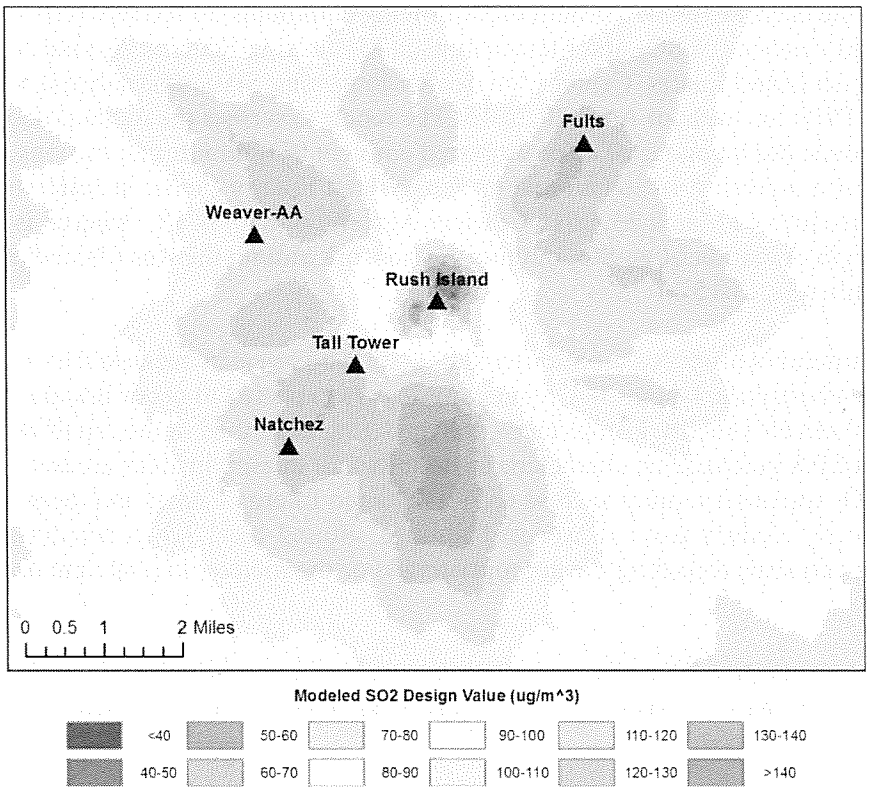

Figure 1. Modeled SO_2 design values in the vicinity of the Rush Island Energy Center.

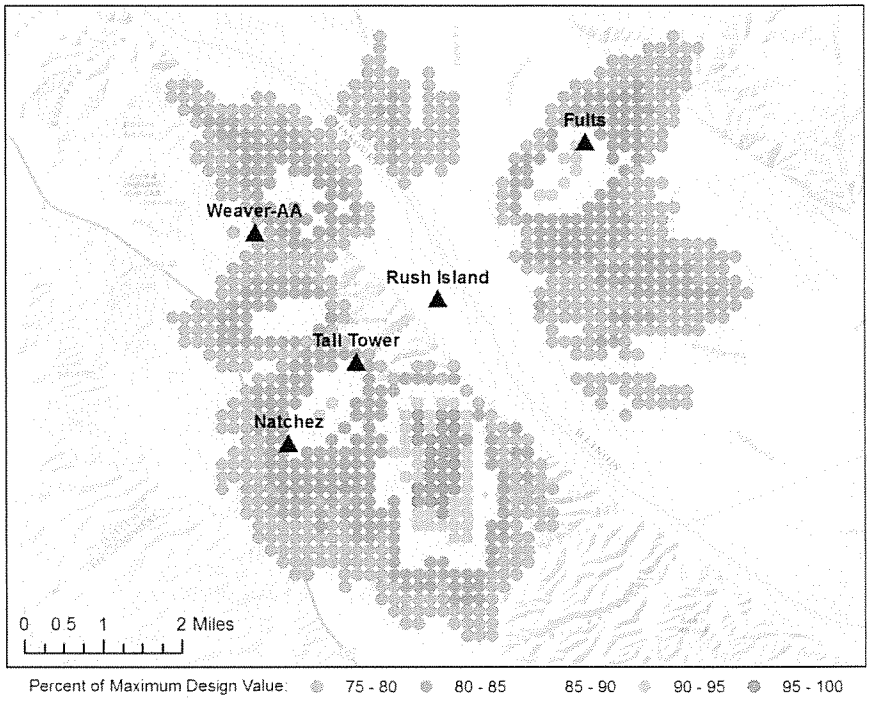

Figure 2. Receptors with modeled design values ≥75 percent of the maximum modeled design value.

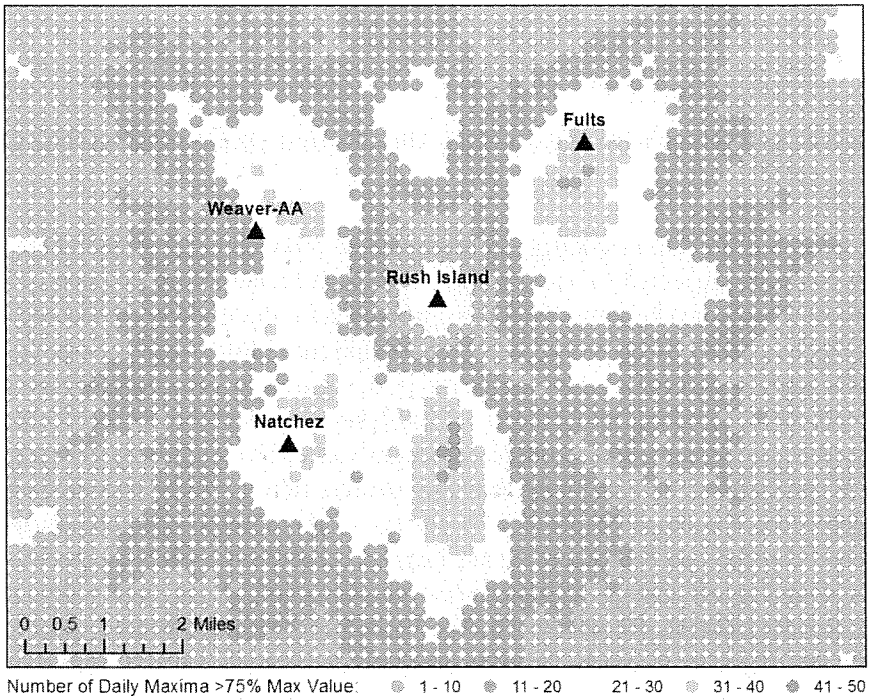

Figure 3. Number of maximum daily 1-hour concentrations ≥75 percent of the maximum modeled design value.

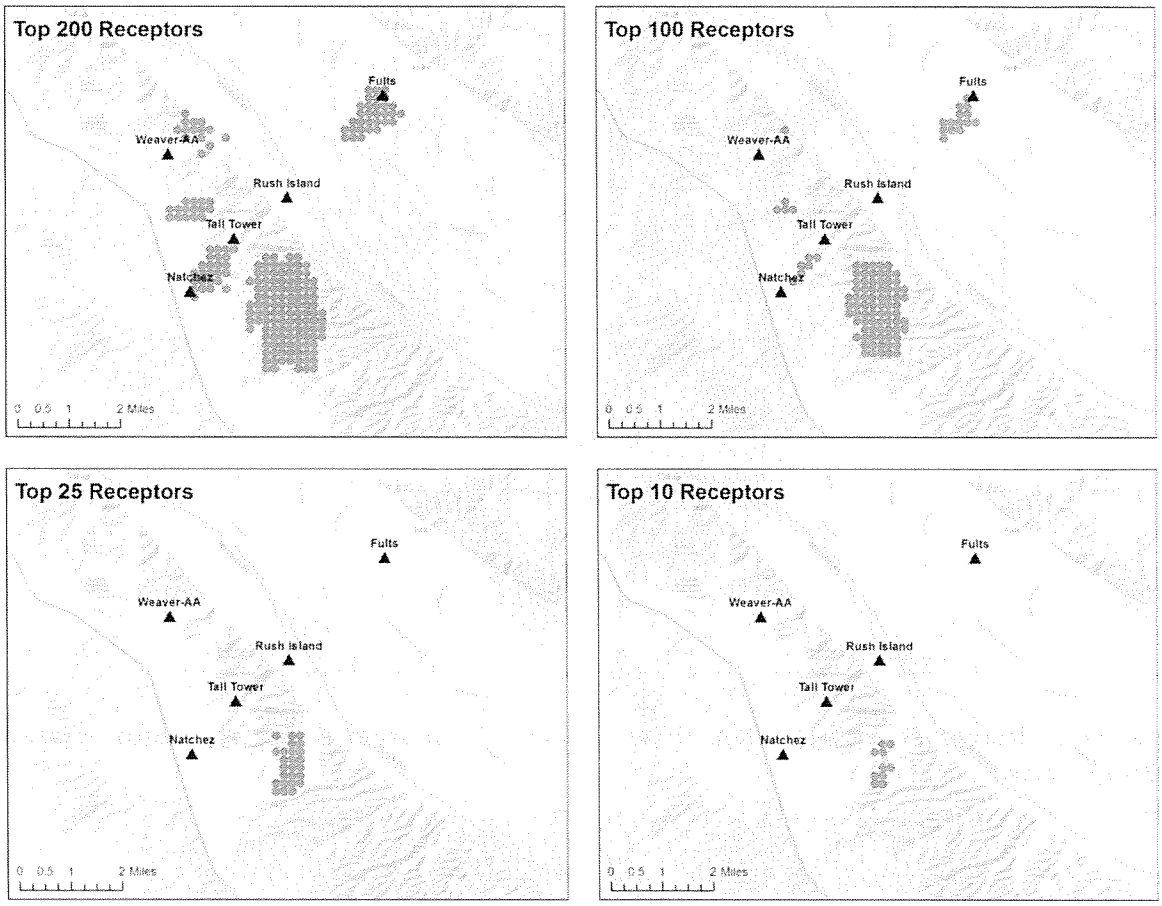

Figure 4. Receptors with the top 200, 100, 25, and 10 modeled design values.

Figures 1 through 4 all reveal a strikingly similar pattern regarding the areas where peak 1-hour SO_2 concentrations are expected to occur around the Rush Island Energy Center. There is a large area due south of the plant where modeled design values are the highest (in excess of 95 percent of the maximum modeled design value), where modeled maximum daily 1-hour concentrations frequently exceeded 75 percent of the maximum modeled design value, and where over half of the top 200 receptors (including all of the top 25 and three quarters of the top 100) are located. There are also four other areas where modeled design values are slightly lower but still very high (in excess of 85 percent of the maximum modeled design value), where modeled maximum daily 1-hour concentrations frequently exceeded 75 percent of the maximum modeled design value, and where the rest of the top 200 receptors are located. These four areas, located northeast, northwest, west, and southwest of the plant, plus the area south of the plant where modeled design values are the highest, are where Ameren's modeling predicts peak 1-hour SO_2 concentrations are expected to occur. Monitoring stations located in these areas would have the greatest chance of identifying peak SO_2 concentrations in ambient air, which is the primary objective of source-oriented monitoring and an absolute necessity when monitoring to assess

compliance with the NAAQS. However, none of Ameren's proposed monitoring stations is located in any of these areas of highest expected concentrations.

The most glaring omission is that there is no proposed monitoring station in the large area of highest expected concentrations south of the plant. This omission renders the proposed monitoring network inadequate for its intended purpose of assessing compliance with the NAAQS because a) NAAQS violations are most likely to occur in this area, and b) violations could occur in this area even when concentrations are below the NAAQS in other high concentration areas, given that the modeling predicts lower SO_2 concentrations in those areas. Ameren's Monitoring Stations Analysis claims that this area is "not accessible" because it hosts an industrial plant (Holcim). The Analysis does not indicate whether Ameren sought Holcim's permission to site a monitor on the Holcim property, and does not delineate the Holcim property boundary in terms of the modeling results. In other words, it does not document the claim that this large area of maximum expected concentrations is inaccessible for monitoring. Nor does it evaluate the nearest non-Holcim site that might be available.

While we understand that the Consent Agreement between DNR and Ameren calls for monitoring, it requires that such monitoring "represents ambient air quality in areas of maximum SO_2 impact from the Rush Island Energy Center." If no monitoring site is in fact accessible in this large area of the very highest expected concentrations, then the proposed monitoring network will not fulfill Ameren's obligation under the Consent Agreement. Instead, DNR should employ modeling, which provides 360-degree coverage and can predict concentrations at otherwise-inaccessible locations, to ensure that SO_2 emissions from the Rush Island plant do not cause or contribute to NAAQS exceedances either inside or outside of the Jefferson County nonattainment area.

Furthermore, two of the proposed monitoring stations – Fults and Natchez – are located near but outside of areas of modeled peak concentration/high frequency instead of near the center of such areas, where concentrations are expected to be higher. The third proposed station – Weaver-AA – is located entirely outside of modeled peak concentration/high frequency areas. Figure 5 shows the locations of the proposed monitoring stations on a hybrid basemap comprised of Figures 1 (modeled design values) and 2 (receptors with modeled design values $\geq$75 percent of the maximum design value). Receptors that are among the 200 with the highest modeled design values are outlined for reference. All three monitoring stations could easily be sited in areas where higher 1-hour SO_2 concentrations are expected to occur with greater frequency, thereby increasing their chances of detecting any NAAQS exceedances that might occur around the Rush Island Energy Center. As discussed below, we urge DNR to consider these proposed optimized locations in lieu of Ameren's proposed Fults, Natchez, and Weaver-AA locations.

Fults – Of the three proposed monitoring stations, the Fults monitoring station is closest to an area where peak 1-hour SO_2 concentrations are expected to occur. However, moving the monitor less than one kilometer southwest of its current location would move it from an area with modeled design values in the 120-130 ug/m^3 range to an area with modeled design values in the 130-140 ug/m^3 range and place it near the center of a small group of receptors with modeled design values equal to 90-95 percent of the maximum modeled design value (the receptors

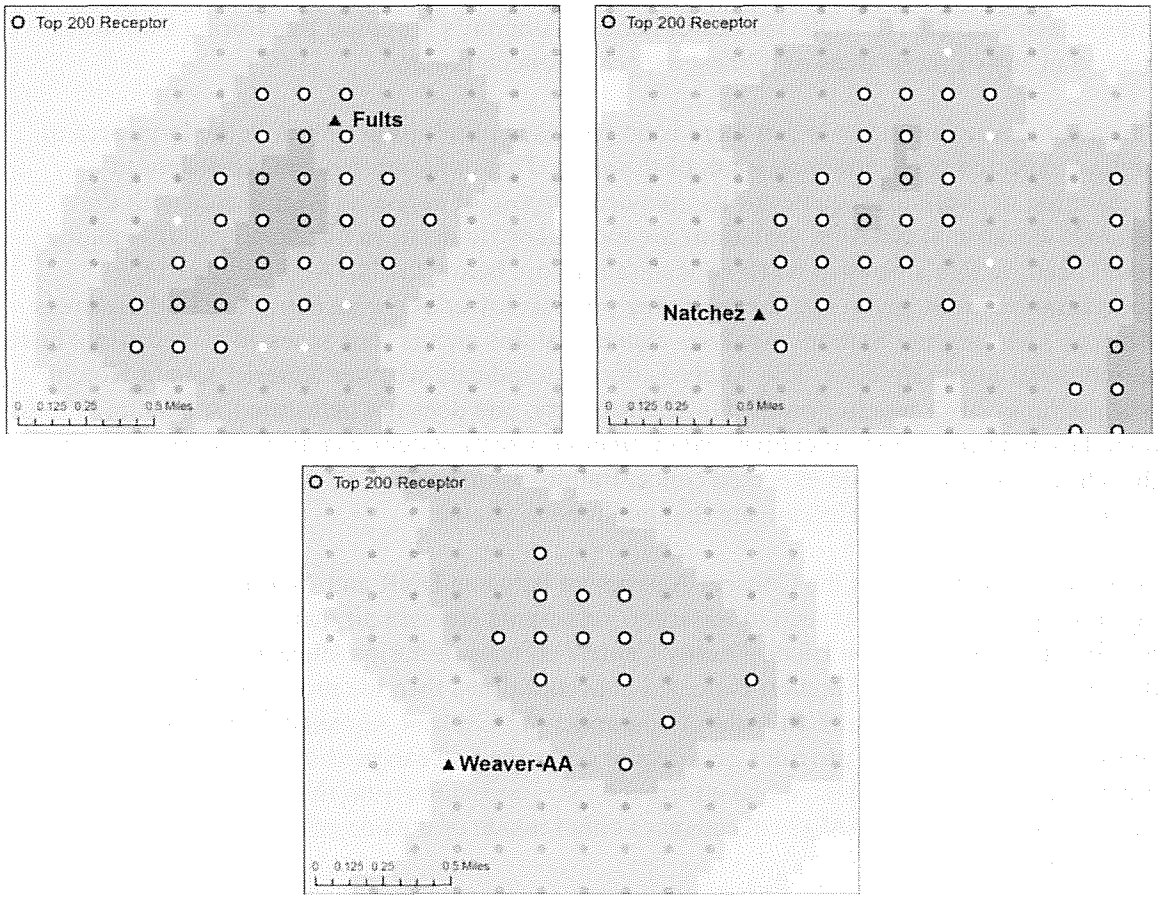

Figure 5. Modeled design values, receptors with design values ≥75 percent of the maximum modeled design value, and proposed monitoring station locations.

surrounding its current location generally have modeled design values equal to 85-90 percent of the maximum modeled design value). The entire area is floodplain/agricultural and Ivy Road, oriented northeast-southwest, runs through the middle of it, making the proposed optimized location as accessible as Ameren's proposed location and equally easy to provide power to.

Natchez – The Natchez monitoring station is outside/on the outer edge of an area where peak 1-hour SO_2 concentrations are expected to occur. Moving it approximately one kilometer northeast of its current location would move it from an area with modeled design values in the 120-130 ug/m^3 range to an area with modeled design values in the 130-140 ug/m^3 range, and place it between a pair of receptors with modeled design values equal to 90-95 percent of the maximum modeled design value (the receptors surrounding its current location have modeled design values equal to 80-90 percent of the maximum modeled design value). It would also move it to an area where higher concentrations are expected to occur with slightly greater frequency. The proposed optimized location is accessible via transmission right of way, and power is available along Dubois Creek Road to the south-southwest.

Weaver-AA – The Weaver-AA station is located completely outside of all areas where peak 1-hour SO2 concentrations are expected to occur. Modeled design values at its location are only in the 100-110 ug/m^3 range, and it is surrounded by receptors with modeled design values equal to just over 75 percent of the maximum modeled design value. Moving the monitor just over one kilometer east-northeast of its current location would place it in an area where modeled design values are 15-20 ug/m^3 higher, in the midst of a slightly dispersed group of receptors with modeled design values equal to 85-90 percent of the maximum modeled design value. At this optimized location, concentrations in excess of 75 percent of the maximum modeled design value are expected to occur roughly twice as often as at Ameren's proposed Weaver-AA location. The proposed optimized location is readily accessible via State Highway AA, and power is available along the highway.

Figure 6 compares the locations of Ameren's proposed Fults, Natchez, and Weaver-AA monitoring stations with optimized locations more likely to record maximum SO_2 concentrations in the area.

II. The Modeling Described in the Report Does Not Comport With EPA's Source-Oriented SO_2 Monitoring Guidance and Therefore May Not Correctly Identify Areas of Expected Ambient, Ground-Level SO_2 Concentration Maxima

EPA's SO_2 NAAQS Designations Source-Oriented Monitoring Technical Assistance Document (TAD) provides guidance on how to "appropriately and sufficiently monitor ambient air in areas proximate to or impacted by an SO_2 emissions source to create ambient monitoring data for comparison to the SO_2 NAAQS" and presents "recommended steps to aid in identifying source-oriented SO_2 monitor sites."[1] The modeling performed to determine the locations of the proposed ambient SO_2 monitoring stations around the Rush Island Energy Center fails to adhere to the TAD in two important respects: 1) it does not use hourly emission rates, which are readily available for Rush Island's boilers from EPA's online Air Markets Program Data tool; and 2) it does not include nearby sources that may contribute significantly to ambient SO_2 concentrations in the vicinity of the plant and therefore should be included in the modeling.

EPA suggests using hourly emissions when available in order to represent the variability of actual emissions as accurately as possible,[2] which is important given the short-term nature of the SO_2 NAAQS. However, instead of using readily-available hourly emissions as recommended by EPA's monitoring TAD, Ameren's modeling uses constant emission rates for Rush Island's boilers. The consequence of using constant rather than hourly emission rates is that the effects of the interaction between hourly emissions and hourly variations in meteorological parameters are not captured by the model, so that the predicted areas of peak concentration are primarily a function of the meteorology used. For example, if peak hourly emissions coincide with times when strong winds blow from a direction other than the prevailing wind direction, a model that uses hourly emission rates might predict peak concentrations in different areas than the same

[1] U.S. EPA, SO_2 NAAQS Designations Source-Oriented Monitoring Technical Assistance Document, Dec. 2013 Draft, at 2, available at http://epa.gov/airquality/sulfurdioxide/pdfs/SO2MonitoringTAD.pdf.

[2] *Id.* at 11, referencing U.S. EPA, SO_2 NAAQS Designations Modeling Technical Assistance Document, Dec. 2013 Draft, at 10, available at http://epa.gov/airquality/sulfurdioxide/pdfs/SO2ModelingTAD.pdf.

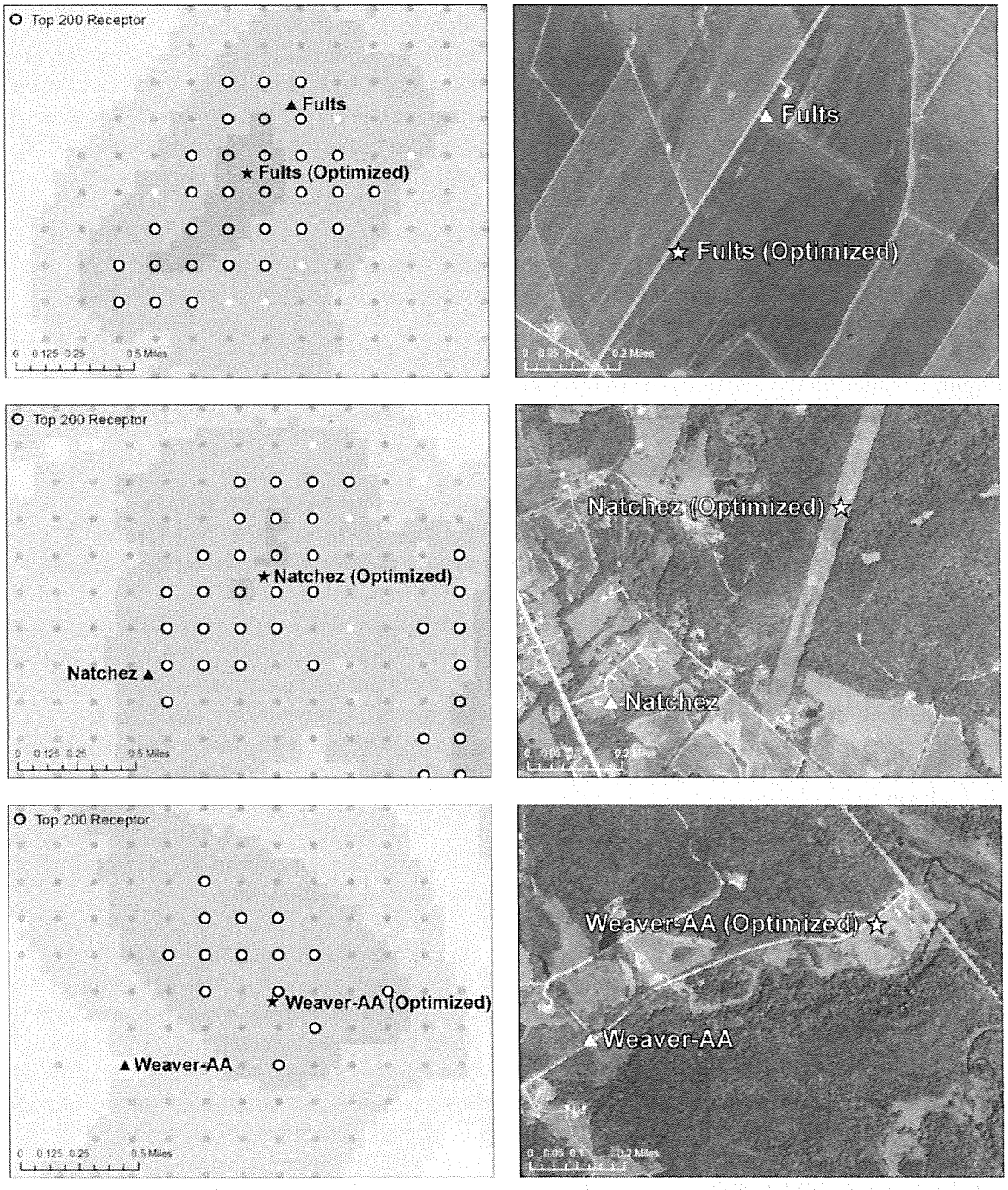

Figure 6. Current and optimized locations of the Fults, Natchez, and Weaver-AA monitoring stations

model would predict using constant emission rates. Therefore, using hourly emissions allows the areas where peak 1-hour SO_2 concentrations are expected to occur to be determined with greater confidence.

Regarding which sources to model, EPA suggests identifying and including all sources that may contribute significantly to ambient SO_2 concentrations – and thus to NAAQS exceedances – around the source of interest. The monitoring TAD notes that it is important to "understand the setting and surroundings of the SO_2 source" including determining "if the source is isolated or in an area with multiple SO_2 sources," and it affirms that the primary objective of monitoring is "to identify peak SO_2 concentrations in the ambient air that are attributable to an identified source *or group of sources.*"[3] The Rush Island Energy Center is located in an SO_2 nonattainment area with numerous sources of varying magnitude. There are also a number of larger sources that are nearby but just outside of the nonattainment area, including River Cement, St. Gobain Containers, Holcim, Mississippi Lime, Dynegy's Baldwin Energy Complex, and Ameren's Meramec Energy Center. These sources may contribute significantly to ambient SO_2 concentrations in the vicinity of the Rush Island plant and should be included in the modeling unless it can be demonstrated that they do not have a significant influence on areas where peak 1-hour SO_2 concentrations are expected to occur.

III. The Meteorological Data Used in the Modeling May Not be Appropriate

Ameren's modeling uses National Weather Service (NWS) meteorological data from the Cahokia, Illinois airport located approximately 50 kilometers north of the plant. This is different from the meteorological data DNR used in its attainment demonstration modeling for the Jefferson County SO_2 nonattainment SIP. In its SIP modeling, DNR used onsite meteorological data from the now-closed Doe Run primary lead smelter in Herculaneum, approximately 18 kilometers northwest of the Rush Island plant. The Rush Island Energy Center is in the Jefferson County SO_2 nonattainment area, and the Jefferson County SIP states that the onsite meteorological data from Herculaneum is "considered more representative of the entire [nonattainment] area compared to a more distant NWS site."[4] Therefore, the Cahokia meteorological data used in Ameren's modeling may not be appropriate, particularly if – as suggested above – other nearby SO_2 sources are included in the modeling, given that DNR determined – based on the distribution of these sources – that the onsite Herculaneum meteorological data is more representative of the area that encompasses them.

Conclusion

Based on the modeling described in Ameren's report, the proposed locations of the Fults, Natchez, and Weaver-AA monitoring stations are not in modeled peak concentration/high frequency areas. Furthermore, Ameren has not proposed a monitoring station in the highest concentration area due south of the Rush Island Energy Center, citing the claimed but not

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[3] *Id.* at 2, 4 (emphasis added).

[4] DNR, Nonattainment Plan for the 2010 1-Hour Sulfur Dioxide National Ambient Air Quality Standard, Jefferson County Sulfur Dioxide Nonattainment Area, May 28, 2015, at 26.

documented inaccessibility of potential monitoring sites in that area. The absence of a monitor in this large area of expected maximum concentration calls into question whether the proposed SO_2 monitoring network is an appropriate means of assessing compliance with the NAAQS in the area around the plant.

Ameren's proposed monitoring network does not fulfill its requirement under the Consent Agreement to install a monitoring network designed to record maximum expected SO_2 concentrations in the vicinity of the Rush Island plant. Nor is it designed to achieve Ameren's purported goal of obtaining "a good quality data set with representative SO_2 measurements and meteorological information"[5] or DNR's stated goal "to true-up modeling results further away from the Mott Street monitor … to confirm our assessment that the nonattainment area is in compliance with the 1-hour SO2 standard farther away from the violating monitor."[6]

We urge DNR to reject the proposed monitoring sites and require Ameren to add a monitoring station in the highest concentration area due south of the plant as well as to relocate the proposed Fults, Natchez, and Weaver-AA monitoring stations to the optimized locations shown in Figure 5. We also urge DNR to require Ameren to 1) rerun the air dispersion model described in the report using Rush Island's actual hourly emissions; 2) evaluate the effects of nearby interactive sources (including, at a minimum, River Cement, St. Gobain Containers, Holcim, Mississippi Lime, Dynegy's Baldwin Energy Complex, and Ameren's Meramec Energy Center) on modeled peak concentration/high frequency areas; and 3) evaluate the appropriateness of using meteorological data from the Cahokia, Illinois airport instead of Doe Run Herculaneum given DNR's determination that the latter is more representative of the modeled area.[7] We further urge DNR to require any necessary adjustments to the proposed monitoring network based on the results of these analyses.

Respectfully submitted,

Maxine I. Lipeles

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Ken Miller, P.G.
Interdisciplinary Environmental Clinic
Washington University School of Law

On behalf of the Sierra Club

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[5] DNR, Comments and Responses on Proposed Revision to Missouri State Implementation Plan – Nonattainment Plan for the 2010 1-Hour Sulfur Dioxide National Ambient Air Quality Standard – Jefferson County Sulfur Dioxide Nonattainment Area, Comment #21, p. 10, available at http://dnr.mo.gov/env/apcp/docs/comments-and-responses-jeffco.pdf.

[6] *Id.*, Response to Comment #4, p. 3.

[7] This analysis should consider and make use of the corrected Herculaneum meteorological data set processed in AERMET with the Bulk Richardson Number option invoked.

Cc: Rebecca Weber, Director, Air & Waste Management Division, EPA Region 7
Josh Tapp, Chief, Air Planning & Development Branch, EPA Region 7
Kyra Moore, Director, Air Pollution Control Program, DNR
Wendy Vit, Chief, Air Quality Planning Section, Air Pollution Control Program, DNR

Clean Air Act Key SIP Provisions

This document is from Chapter 1 of "**The On-line State Implementation Plan Processing Manual.**" EPA's On-Line SIP Processing Manual is available on the internet at https://cfpub.epa.gov/oarwebadmin/sipman/sipman/ through a guest login. You may login by clicking on the text box "Guest Entrance" on the home page.

The Clean Air Act contains several sections that identify specific requirements for what a State must submit. The following excerpts from the Clean Air Act, as amended in 1990, identify many of these requirements.

Section 107. (a) **Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan** for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 110. (a)(1) **Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years** (or such shorter period as the Administrator may prescribe) **after the promulgation of a national primary ambient air quality standard** (or any revision thereof) **under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region** (or portion thereof) **within such State**. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State.

Section 110(c)(1) The Administrator shall **promulgate a Federal implementation plan** at any time within 2 years after the Administrator (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 110(k)(1)(A), or (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Section 110(h)(1) Not later than 5 years after the date of enactment of the Clean Air Act Amendments of 1990, and every three years thereafter, the **Administrator shall assemble and publish a comprehensive document for each State** setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

Section 110 (k) Environmental Protection Agency Action on Plan Submissions. (1) Completeness of plan submissions. ... (B) **Completeness finding. Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met**. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria. (C) Effect of finding of incompleteness. Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof). (2) **Deadline for action. Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3)**. (3) Full and partial approval and disapproval. In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this Act. If a portion of the plan revision meets all the applicable requirements of this Act, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this Act until the Administrator approves the entire plan revision as complying with the applicable requirements of this Act. (4) Conditional approval. The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment. (5) Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184, or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this Act to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D, unless such date has elapsed). (6) Corrections. Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public. (l) Plan Revisions. Each revision to an implementation plan submitted by a State under this Act shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.

Section 110 (m) Sanctions. The Administrator **may apply any of the sanctions listed in section 179(b) at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 179(a) in relation to any plan or plan item (as that term is defined by the Administrator) required under this Act, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this Act relating to such plan or plan item are met.** The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 179(a) to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 179(a), such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

Section 110 (n) Savings Clauses. (1) Existing plan provisions. Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this Act.

[A SIP can only replace an existing SIP element if the new SIP measures achieves equivalent or better emission reductions.]

Section 110 (o) Indian Tribes. If an Indian tribe submits an implementation plan to the Administrator pursuant to section 301(d), the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 301(d)(2). When such plan becomes effective in accordance with the regulations promulgated under section 301(d), the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

[Tribal Implementation Plan (TIP). Please see -- Federal Register, Thursday, February 12, 1998, vol. 63, page 7254-7274; Final Rule, Indian Tribes: Air Quality Planning and Management; 40 CFR Parts 35, 49, 50 and 81.] *(View a PDF file of this* document http://www.gpo.gov/fdsys/pkg/FR-1998-02-12/pdf/98-3451.pdf .*)*

> Final Rule Summary: The Clean Air Act (CAA) directs EPA to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes in the same manner as states. For those provisions specified, a tribe may develop and implement one or more of its own air quality programs under the Act. This final rule sets forth the CAA provisions for which it is appropriate to treat Indian tribes in the same manner as states, establishes the requirements that Indian tribes must meet if they choose to seek such treatment, and provides for awards of federal financial assistance to tribes to address air quality problems. This Final Rule is effective on March 16, 1998.]

Section 113. Federal Enforcement. (a) In General. (1) **Order to comply with SIP.** Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of title 28 of the United States Code) (A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit, (B) issue an administrative penalty order in accordance with subsection (d), or (C) bring a civil action in accordance with subsection (b). (2) State failure to enforce sip or permit program. Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under title V are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with title V. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by (A) issuing an order requiring such person to comply with such requirement or prohibition, (B) issuing an administrative penalty order in accordance with subsection (d), or (C) bringing a civil action in accordance with subsection (b). (3) EPA enforcement of other requirements. Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this title, section 303 of title III, title IV, title V, or title VI, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or titles, or for the payment of any fee owed to the United States under this Act (other than title II), the Administrator may (A) issue an administrative penalty order in accordance with subsection (d), (B) issue an order requiring such person to comply with such requirement or prohibition, (C) bring a civil action in accordance with subsection (b) or section 305, or (D) request the Attorney General to commence a criminal action in accordance with subsection (c).

PART D PLAN REQUIREMENTS FOR NONATTAINMENT AREAS 1

SUBPART 1 NONATTAINMENT AREAS IN GENERAL

Section 174. Planning Procedures. (a) In General. For any ozone, carbon monoxide, or PM-10 nonattainment area, the State containing such area and elected officials of affected local governments shall, before the date required for submittal of the inventory described under sections 182(a)(1) and 187(a)(1), jointly review and update as necessary the planning procedures adopted pursuant to this subsection as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990, or develop new planning procedures pursuant to this subsection, as appropriate. In preparing such procedures the State and local elected officials shall determine which elements of a revised implementation plan will be developed, adopted, and implemented (through means including enforcement) by the State and which by local governments or regional agencies, or any combination of local governments, regional agencies, or the State. ...

Section 176. Limitations On Certain Federal Assistance. No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 110. No metropolitan planning organization designated under section 134 of title 23, United States Code, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 110. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and (B) that such activities will not: (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

No later than one year after the date of enactment of the Clean Air Act Amendments of 1990, the Administrator shall promulgate criteria and procedures for determining conformity (except in the case of transportation plans, programs, and projects) of, and for keeping the Administrator informed about, the activities referred to in paragraph (1). [This provision is commonly referred to as general conformity. Please see -- 40 CFR Section 51 Subpart W - Determining Conformity of General Federal Actions to State or Federal Implementation Plans, Sections 51.850 through 51.860.

Sources ---- Federal Register, Tuesday, November 30, 1993, vol. 58, page 63213-63259; Final Rule, Determining Conformity of General Federal Actions to State or Federal Implementation Plans; 40 CFR Parts 6, 51 and 93;]

No later than one year after such date of enactment, the Administrator, with the concurrence of the Secretary of Transportation, shall promulgate criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects. [This provision is commonly referred to as transportation conformity. Please see -- 40 CFR Section 51 Subpart T - Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act, Sections 51.390 through 51.464.

Sources ---- Federal Register, Wednesday, November 24, 1993, vol. 58, pages 62187-662253; Final Rule, Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act; 40 CFR Parts 51 and 93;

As amended by - Federal Register, Wednesday, February 8, 1995, vol. 60, pages 7449-7453; Interim Final Rule, Transportation Conformity Rule Amendments: Transition to the Control Strategy Period; 40 CFR Parts 51 and 93;

As amended by the first set of amendments - Federal Register, Monday, August 7, 1995, vol. 60, pages 40098-40101; Final Rule, Transportation Conformity Rule Amendments: Transition to the Control Strategy Period; 40 CFR Parts 51 and 93;

As amended by - Federal Register, Tuesday, August 29, 1995, vol. 60, pages 44762-44763; Interim Final Rule, Transportation Conformity Rule Amendments: Authority for Transportation Conformity Nitrogen Oxides Waivers; 40 CFR Parts 51 and 93;

As amended by the second set of conformity amendments - Federal Register, Tuesday, November 14, 1995, vol 60, pages 57179-57186; Final Rule, Transportation Conformity Rule Amendments: Miscellaneous Revisions; 40 CFR Parts 51 and 93;

As amended by the third set of conformity amendments - Federal Register, Tuesday, August 15, 1997, vol 62, pages 43779-43818; Final Rule, Transportation Conformity Rule Amendments: Flexibility and Streamlining; 40 CFR Parts 51 and 93.]

Section 176 also requires that ... "Such procedures shall also include a requirement that each State shall submit to the Administrator and the Secretary of Transportation within 24 months of such date of enactment, a revision to its implementation plan that includes criteria and procedures for assessing the conformity of any plan, program, or project subject to the conformity requirements of this subsection." The requirements for the states to prepare and adopt Transportation Conformity SIPs and General Conformity SIP are established at 40 CFR Part 93 Subpart A - Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act Sections 93.100 through 93.136 (1); and 40 CFR Part 93 Subpart B- Determining Conformity of General Federal Actions to State or Federal Implementation Plans, Sections 93.150 through 93.160; respectively. EPA's conformity rule will be superseded by the state's own Transportation Conformity SIP and General Conformity SIP upon EPA approval into the state's SIP.

(1) The transportation conformity amendments provided the States with an extension, (twelve months from the date of the Federal Register's Final Rule,) to get their Transportation Conformity SIPs into EPA.

Section 301. (a)(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations subject to section 307(d), as he may deem necessary or expedient.

(2) Not later than one year after the date of enactment of this paragraph, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed-

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the Act;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this Act in implementing and enforcing the Act, particularly in the review of new sources and in enforcement of the Act; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the Act.

(b) Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this Act.

(c) Payments under grants made under this Act may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

(d) Tribal Authority.- (1) Subject to the provisions of paragraph (2), the Administrator-

(A) is authorized to treat Indian tribes as States under this Act, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 105; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this Act.

(2) The Administrator shall promulgate regulations within 18 months after the date of the enactment of the Clean Air Act Amendments of 1990, specifying those provisions of this Act for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if-

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105. [42 U.S.C. 7601]

Section 302. When used in this Act-

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term "interstate air pollution control agency" means-

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this Act.1

(l) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this Act, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110, or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) and which implements the relevant requirements of this Act.

(r) Indian Tribe.- The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.- The term "VOC" means volatile organic compound, as defined by the Administrator.

(t) PM-10.- The term "PM-10" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS and CTG.- The term "NAAQS" means national ambient air quality standard. The term "CTG" means a Control Technique Guideline published by the Administrator under section 108.

(v) NOx.- The term "NOx " means oxides of nitrogen.

(w) CO.- The term "CO" means carbon monoxide.

(x) Small Source.- The term "small source" means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) Federal Implementation Plan.- The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) Stationary Source.- The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216.

[42 U.S.C. 7602]

1 So in original. Second period added by P.L. 10109549, sec. 302(e), 104 Stat. 2574.

Section 304. Citizen Suits. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty

under this Act which is not discretionary with the Administrator, or (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment) or who is alleged to be in violation of any condition of such permit. ...

Section 307. (a) In connection with any determination under section 110(f), or for purposes of obtaining information under section 202(b)(4) or 211(c)(3),,(1) any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the Act (including but not limited to section 113, section 114, section 120, section 129, section 167, section 205, section 206, section 208, section 303, or section 306), the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be discussed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 202(c), or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In cases of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111,,(2) any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112,,(3) under section 119, or under section 120, or his action under section 119(c)(2) (A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is local or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a

determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to(4) the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d)(1) This subsection applies to

(A) the promulgation or revision of any national ambient air quality standard under section 109,

(B) the promulgation or revision of an implementation plan by the Administrator under section 110(c),

(C) the promulgation or revision of any standard of performance under section 111, or emission standard or limitation under section 112(d), any standard under section 112(f), or any regulation under section 112(g)(1)(D) and (F), or any regulation under section 112(m) or (n),

(D) the promulgation of any requirement for solid waste combustion under section 129,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211,

(F) the promulgation or revision of any aircraft emission standard under section 231,

(G) the promulgation or revision of any regulation under title IV (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 119 (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under title VI (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under subtitle C of title I (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 202 and test procedures for new motor vehicles or engines under section 206, and the revision of a standard under section 202(a)(3),

(L) promulgation or revision of regulations for noncompliance penalties under section 120,

(M) promulgation or revision of any regulations promulgated under section 207 (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 126 (relating to interstate pollution abatement),

(N)(5) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 183(e),

(O) the promulgation or revision of any regulation pertaining to field citations under section 113(d)(3),

(P) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of title II,

(Q) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 213,

(R) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 217,

(S) the promulgation or revision of any regulation under title IV (relating to acid deposition),

(T) the promulgation or revision of any regulation under section 183(f) pertaining to marine vessels, and

(U) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to action to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, United States Code, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule. The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 109(d) and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after the date of enactment of the Clean Air Act Amendments of 1977.

(e) Nothing in this Act shall be construed to authorize judicial review of regulation or orders of the Administrator under this Act, except as provided in this section.

(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) In any action respecting the promulgation of regulations under section 120 or the administration or enforcement of section 120 no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public Participation. It is the intent of Congress that, consistent with the policy of the Administrative Procedures Act, the Administrator in promulgating any regulation under this Act, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section 107(d), 172(a), 181(a) and (b), and 186(a) and (b).

[42 U.S.C. 7607]

1 Double commas added by P.L. 10109549, sec. 703, 104 Stat. 2681.

2 Public Law 950995 inserted the additional comma after the words "under section 111".

3 P.L. 10109549, sec. 706(2), 104 Stat. 2682, inserted the additional comma after the words "under section 112,".

4 So in original public law. The word "to" probably should not appear.

5 So in law. P.L. 10109549, sec. 302(h) added a new subparagraph (D) and "redesignated the succeeding subparagraphs accordingly". Section 110(5)(C) of P.L. 10109549 added new subparagraphs (N)09(T). Neither amendment gave reference to the other.